IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.12.2017

CORAM:

THE HONOURABLE MR. JUSTICE P.N.PRAKASH

Crl.O.P.No.25880 of 2017
in
Crl.A.No.SR.11317 of 2016

C.Vanaja ...Petitioner/Appellant

versus

V.N.Krishnan ...Respondent/Accused

Criminal Original Petition filed under Section 378 (4) of the Criminal Procedure Code to grant Leave to file an appeal to this Court against the judgment dated 29.09.2015 passed in Criminal Appeal No.28 of 2014 on the file of the I Additional District and Sessions Judge, Coimbatore.

For Petitioner : Mr.S.B.Viswanathan

For Respondent : Mr.L.Mouli

ORDER

This Criminal Original Petition has been filed to grant leave to file an appeal against the judgment dated 29.09.2015 in Criminal Appeal

No.28 of 2014 passed by the learned Chief Judicial Magistrate, Perambalur District.

2. For the sake of convenience, the petitioner and the respondent will be referred to as the complainant and the accused respectively.

3. It is the case of the complainant that on 10.10.2006, the accused borrowed Rs.15,00,000/- and issued a cheque dated 04.01.2017 (Ex.P.1) for Rs.15,00,000/-, which was presented by the complainant on 05.01.2007 and it was dishonoured on 08.01.2017 vide cheque return memo (Ex.P.2). The complainant issued a statutory notice dated 03.02.2007 (Ex.P.3). But, the accused neither responded nor returned the amount. Hence, the complainant initiated a prosecution in C.C.No.1008 of 2007 before the learned Judicial Magistrate No.III, Coimbatore and the case was transferred to the Court of learned Judicial Magistrate, Fast Track Court, No.I, Coimbatore and renumbered as C.C.No.66 of 2013. On the appearance of the accused, he was explained about the accusation against him, which he denied.

4.In order to prove the case, the complainant examined herself as P.W.1 and marked four exhibits. When the accused was questioned about the incriminating circumstances appearing against him under Section 313 Cr.P.C., he denied the same. On behalf of the accused, he examined himself as D.W.1 and marked eighteen exhibits.

5. After analysing the evidence on record and hearing either side, the trial Court, by judgment dated 28.01.2014 in C.C.No.66 of 2013, convicted the accused under Section 138 of the Negotiable Instruments Act, 1881 and sentenced him to undergo one year Rigorous Imprisonment and pay a fine of Rs.10,000/-, in default to undergo three months Simple Imprisonment. Challenging the said conviction and sentence, the accused filed Criminal Appeal No.28 of 2014 before the learned First Additional District and Sessions Judge, Coimbatore. The first appellate Court, by order dated 29.09.2015, acquitted the accused, against which, the complainant has preferred the present appeal against the order of acquittal with leave petition.

6. The learned counsel for the complainant submitted that the trial Court convicted and sentenced the accused finding him guilty, which the first appellate Court has not properly appreciated, but has acquitted the accused, erroneously.

7. Per contra, the learned counsel for the accused refuted the allegations

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8. This Court gave its anxious consideration to the rival submissions.

9. Before deciding the issue at hand, it may be necessary to extract the following passage from the judgment of the Supreme Court in **Arulvelu & another vs. State rep. by the Public Prosecutor and another [2009 (10) SCC 206]:**

> *"**36.**Careful scrutiny of all these judgments lead to the definite conclusion that the appellate court should be very slow in setting aside a judgment of acquittal particularly in a case where two views are possible. The trial court judgment can not be set aside because the appellate court's view is more probable. The appellate court would not be justified in setting aside the trial court judgment unless it arrives at a clear finding on marshalling the entire evidence on record that the judgment of the trial court is either perverse or wholly unsustainable in law."*

10. It is the specific case of the complainant that the accused had borrowed money on 10.10.2006 and had issued a cheque for Rs.15,00,000/- on 04.01.2017, whereas, it is the specific case of the accused that the complainant had forcibly obtained a promissory note and cheques from the accused on 10.10.2006 and therefore, the accused filed O.S.No.2425 of 2006 against the complainant before the District Munsif Court, Coimbatore for mandatory injunction restraining the complainant from misusing the promissory note and cheque. In the said suit, the complainant had filed vakalat and entered appearance. Thus, when there was such a serious dispute between the complainant and the accused with regard to the impugned cheque, the possibility of the accused issuing a cheque on 04.01.2007, appears a little improbable.

11. The learned counsel for the complainant submitted that even in the evidence of the accused, he has stated that subsequent to 2006, the cheque was issued. He has also not stated in the evidence that the cheque was obtained under threat or coercion. However, in the cross-examination of the complainant, she has stated that she came to know the accused only three months prior to 10.10.2006 and he had completely suppressed about the litigation in O.S.No.2425 of

2006. Assuming for a moment that the accused had borrowed money on 10.10.2006 and had filed O.S.No.2425 of 2006 on 14.10.2006 in order to cheat the complainant, the issue would have been different. The complainant would have initiated a case against the accused for cheating against him, which is quite natural. Whereas the complainant has taken the stand that the accused has issued cheque on 04.01.2017 for the alleged debt incurred on 10.10.2006, which appears little unacceptable.

12. In **Rangappa vs. Sri Mohan [(2010) 11 SCC 441],** the Supreme Court has stated that under Section 139 of the Negotiable Instruments Act, 1881 the presumption would include the debt also. Yet, in the same judgment, it has been held that the accused can discharge the burden by preponderance of probabilities.

13. In this case, the accused, by examining himself as a witness and by marking Exs.D.1 to D.18, has established that the litigation against the complainant had commenced in O.S.No.2425 of 2016 on 14.10.2006 itself, in which, the complainant has also entered appearance.

14. The learned counsel for the complainant submitted that the suit was dismissed by the trial Court. It is true that the suit was not even maintainable in view of the bar under the Specific Relief Act. But, filing of the said suit and averments in the plaint go to show that the complainant and the accused were having dealings for over three years and that there was some serious dispute between them on 10.10.2006. To that extent, the fact relating to the filing of the suit becomes relevant.

15. Therefore, this Court is of the opinion that the accused has discharged his burden under Section 138 of the Negotiable Instruments Act.

16. Thus, when there are two views possible, one in favour of the accused and the other in favour of the complainant, the view favouring the accused merits consideration in an appeal against acquittal.

17. In such view of the matter, the judgment of the first appellate Court does not warrant interference and accordingly, this Court is of the opinion that this is not a fit case to grant leave to

appeal.

Resultantly, this Criminal Original Petition stands dismissed, Consequently, connected Criminal Appeal is rejected at the S.R. stage itself.

04.12.2017

Index :Yes/No
Speaking/Non speaking Order
cla

To

1.The I Additional District and Sessions Judge,
Coimbatore.

2.The Judicial Magistrate,
Perambalur.

3.The Public Prosecutor,
High Court, Madras.

P.N.PRAKASH,J.

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